

))))))))))

1. This matter was commenced with the filing of the Complaint on May 23, 2013, alleging causes of action for negligence (Count I) and breach of contract (Count II). *See* Compl. The allegations stem from the survey, engineering, permit approvals, and construction of a multi-family apartment complex in Berkeley County, West Virginia. *Id.*
2. On February 5, 2020, Plaintiff DAR, Inc. (hereinafter “Plaintiff” or “DAR”) filed the instant DAR, Inc.’s Motion for Summary Judgment on the Issue of Liability, seeking summary judgment in favor of it on the issue of liability^[1].

See Pl's Mot., p. 1, 25.

3. On April 28, 2020, Defendant Triad Engineering, Inc. (hereinafter "Defendant" or "Triad") filed Triad Engineering, Inc.'s Response in Opposition to DAR, Inc.'s Motion for Summary Judgment on the Issue of Liability, arguing the motion should be denied as "DAR has not shown that there are no genuine issues of material fact". *See* Def's Resp., p. 24.
4. On a prior day, Plaintiff submitted a Reply entitled "DAR's Reply to Triad's Response to DAR's Motion for Summary Judgment", reiterating its argument that summary judgment should be granted, and averring that although Triad asserts there are disputed facts in this matter, "Triad offers no facts which would justify that outcome". *See* Reply, p. 5.
5. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of*

Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted). However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

CONCLUSIONS OF LAW

As an initial matter, the Court notes the Reply in the instant matter. The Reply was submitted to the undersigned and opposing counsel were copied; however, a review of the court file reveals it does not appear the Reply was placed in the court file. Since opposing counsel was copied, the Court did consider the Reply. If any counsel did not receive a copy of the Reply, the Plaintiff is hereby DIRECTED to copy counsel.

Now, with regard to the instant motion, in its Motion for Summary Judgment, Plaintiff argues summary judgment on the issue of liability is appropriate because the “voluminous factual evidence in this matter shows [that] no trier of fact could possibly find that Triad’s conduct in this matter was not negligent, and not a breach”. *See* Pl’s Mot., p. 3. The Court finds Plaintiff’s Motion should be granted as to the issue of contractual liability. The issues will be taken up in turn.

The Court finds summary judgment should be granted as to the issue of contractual liability relating to Count II, Breach of Contract. Based upon this matter of contractual liability, the Court dispenses with finding on the issue of Negligence (Count

l).

Here, after the Court's review and consideration, the Court finds summary judgment as to liability is appropriate as to Count II, Breach of Contract, because evidence in the record has been proffered to show many instances in which the basic terms of the parties' agreement were not completed by Triad's work.

DAR has argued that Triad breached their agreed-upon contractual obligations to DAR to perform a survey of the entrance road, including but not limited to courthouse title research, and boundary and right of way reviews, as well as to obtain approval from all relevant municipal authorities. *See* Pl's Mot., p. 2. Importantly, DAR has shown, and Triad has not proffered any evidence creating issue of material fact that, Triad did not properly survey the boundaries of the property or did so and did not report their findings to DAR, did not properly examine property titles of relevant properties, or did so and did not report their findings to DAR, did not properly conduct field research, or did so and did not report their findings to DAR, did not properly review ordinances, or did so and did not properly report their findings to DAR, and represented to DAR that there were no survey-related issues and that construction could begin, at which point DAR purchased the property. *Id.*

DAR pointed to evidence in the record, such as the response to a request for admissions that stated that Triad did not verify the existence of a right of way, determine the legal boundaries, or anything else relating to the [disputed entrance] Minister Drive. *Id.* at 5-6. Moreover, DAR pointed to evidence in the record, an admission that Triad admitted a 2008 boundary survey showed a 50' right of way for the entrance to Minister Drive, but that their surveyor did not verify there was a 50' right of way for the entrance to Minister Drive. *Id.* at 6. Instead, the record shows that Triad admits it did not measure the width of the entrance in question until October 2009. *Id.*

Further, evidence in the record shows that Triad admitted that it listed a 50' right

of way on the ALTA survey in 2012, and it did not verify that a 50' right of way was actually available during that survey. *Id.* at 7. Importantly, evidence in the record shows that Triad admits it knew the planning commission would require Minister Drive to be upgraded to meet appropriate commercial standards and specifications. *Id.*

After Triad's plan was rejected by the Planning Commission due to non-compliance with the Berkeley County Subdivision Ordinance, it was directed that "building permits would not be issued until the 12' Easement was shown on Triad's plans and a measurement of the entire entrance was included on Triad plans." *Id.* at 8-9. At this point, DAR has proffered evidence in the record, citing the Prunty Report, that shows that Triad utilized the original Yebernetsky drainage plans from the 1990's, "repurposing 20-year-old work instead of doing the work themselves". *Id.* at 9.

The Court finds that enough examples of evidence in the record in this case was proffered to show that Triad breached its contractual obligations for obtaining plat approval for the project at the heart of this litigation, and the Court concludes that no genuine issues of material fact remain regarding this particular issue. For this reason, the Court finds it appropriate to grant summary judgment as to liability as to the Breach of Contract cause of action. The issue of damages remains.

With regard to the negligence cause of action, Count I, the Court finds genuine issue of material fact remain regarding the issue of professional negligence. The Court dispenses with finding on the issue of negligence at this time and finds that issues regarding the actions relating to the breach, and the particular standards of care applied as to professional engineers and surveyors, shall be presented at the bench trial. The evidence shall be presented to the undersigned at the bench trial in this matter, wherein the Court will review the conduct in relation to the standards of care and any relevant industry standards, and any damages. *See* Pl's Mot., p. 19. For these reasons, the Court denies the instant motion as it pertains to Count I, negligence.

For these reasons, the court must grant the instant motion for summary judgment in part, granting it as to liability regarding the Breach of Contract cause of action.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff DAR, LLC's Motion for Summary Judgment on the Issue of Liability is hereby GRANTED IN PART as described herein. The parties shall proceed with this case pursuant to the West Virginia Rules of Civil Procedure, all other applicable law, and any scheduling orders entered by this Court. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record.

Enter: June 8, 2020

[1] The Court notes it wished to proceed to trial on the issue of damages. *Id.* at 25.

/s/ Christopher Wilkes
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.